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Supreme Court, U.S.
FILED
06-1430 MAR 22 2007
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

AMABLE DE LOS REYES AGUILUZ, JR,
Petitioner

v.

MICHAEL LEVITT, IN HIS CAPACITY AS SECRETARY OF HEALTH AND HUMAN RESOURCES
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Courts of Appeals have jurisdiction to review final administrative decisions of the United States Secretary of Health and Human Resources on exclusions of individuals and entities from participation in Federal and State health care programs under 42 U.S.C. 1320a-7(a)?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the petitioner and respondent as listed in the caption.

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

[x] For cases from **federal courts:**

The opinion of the Court of Appeals for the Ninth Circuit (Before: GOODWIN, McKEOWN and FISHER, Circuit Judges) entered on December 22, 2006 summarily DISMISSED the petition for review for lack of jurisdiction

[ ] reported at:_____; or
[ ] has been designated for publication but is not yet reported; or
[x] unpublished (Case No. 06-73558).

JURISDICTION

The petition for review before the Court of Appeals for the Ninth Circuit was summarily dismissed on December 22, 2006 for lack of jurisdiction under 42 U.S.C. §§ 1320a-7(f) and 405(g).

The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The Secretary of Health and Human Resources excluded petitioner, a physician, from participation in Federal and State health care programs under 42 U.S.C. § 1320a-7(a)(1) for a period of five years following petitioner's plea of "nolo contendere" to a misdemeanor violation of California Business and Professions Code § 650 for which petitioner was sentenced to summary (informal) probation of one month and four days with various monetary assessments.

Petitioner filed a petition for review with the Court of Appeals for the Ninth Circuit pursuant to 42 U.S.C. §§ 1320a-7a(e) and 1320a-8(d).
The Court of Appeals summarily dismissed the petition for review claiming lack of jurisdiction under 42 U.S.C.§§ **1320a-7(f)** and **405 (g)**

REASONS FOR GRANTING THE PETITION

This case is without question the appropriate vehicle for the Court to address the Ninth Circuit's refusal to exercise its jurisdiction to conduct judicial review of final administrative decisions of the Secretary of Health and Human Resources on exclusions of certain individuals and entities from participation in any Federal or State health care program under 42 U.S.C. § 1320a-7(a)(1).

The jurisdiction of the Court of Appeals to review a determination of the Secretary on exclusions of certain individuals and entities under 42 U.S.C. § 1320a-7(a)(1) is specifically provided in 42 U.S.C.§§ **1320a-7a(e)** and **1320a-8(d)**.

42 U.S.C.§ **1320a-7a(e)** expressly provides the any person adversely affected by a determination of the Secretary [in a proceeding to exclude a person from participation in the Federal health care programs as defined in 42 U.S.C. 1320a-7(a)(1)] under this section may obtain a review of such determination in the United States **Court of Appeals** for the circuit in which the person resides, or in which the claim was presented. The jurisdiction of the court shall be **exclusive** and the judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States as provided in section 1254 of Title 28. This section specifically covers a person in petitioner's situation who is excluded from participating in a program under subchapter XVIII of this chapter or a state health care program under section 1320a-7 of this title [see 42 U.S.C. § 1320a-7a(1)(4)].

In like manner, 42 U.S.C. § **1320a-8b** expressly provides that any person adversely affected by a determination of the Commissioner of Social Security to exclude a person who is a medical provider or physician from participation in the programs under subchapter XVIII of this chapter [1320a-8(a)(1)(C)] may obtain a review of such determination in the United States **Court of Appeals** for the circuit in which the person resides or in which the statement or representation referred to in subsection (a) was made. As in 42 U.S.C.§ 1320a-7a(e), it is provided that the jurisdiction of the court shall be **exclusive** and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States as provided in section 1254 of title 28.

However, the Ninth Circuit chose to ignore these specific mandates and summarily dismissed the petition for review by invoking 42 U.S.C. 1320a-7(f) and 405(g).

42 U.S.C. 1320a-7(f) provides that any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to judicial review of the Secretary's final decision "as is provided in section 405(g). In turn, 42 U.S.C. § 405(g) that any individual may obtain a review of the Secretary's final decision by a civil action brought in the district court of he United States.

The Court should resolve this conflict in favor of petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DATED: March 21, 2007.

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Supreme Court, U.S.
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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMABLE DE LOS REYES AGUILUZ, JR., Petitioner, v. MICHAEL LEVITT, in his capacity as Secretary of Health and Human Services, Respondent.	Filed: December 22, 2006 No. 06-73558 HHS No. 04-40631-9 Central District of California Los Angeles **ORDER**

Before: GOODWIN, McKEOWN and FISHER, Circuit Judges.

The court has received and reviewed the parties' responses to the court's November 1, 2006 order to show cause.

Respondent's opposed motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 42 U.S.C. §§ 1320a-7(f) and 405(g).

All other pending motions are denied as moot.

DISMISSED.

SUPPLEMENTAL APPENDIX B

Department of Health and Human Services
DEEPARTMENTAL APPEALS BOARD
Civil Remedies Division

In the Case of:	
	Date:February 24. 2006
Amable de los Reyes Aguiluz.	
Petitioner.	Docket No. C05421
v.	
The Inspector General.	

DECISION

This matter is before me on the Inspector General's (I.G's) Motion for Summary Affirmance of the I.G.'s determination to exclude the petitioner herein, Amable de los Reyes Aguiluz, Jr., M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination to exclude Petitioner are based on the terms of section 1128(a)(1)" of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the imposition of a five year exclusion, and for that reason I grant the I.G.'S Motion for Summary Affirmance.

I. Procedural Background

Amable de los Reyes Aguiluz, Jr., M.D., Petitioner, was licensed to practice medicine in the State of California prior to 2002. On April 15, 2003, Dr. Aguiluz and a co-defendant were named by California's Attorney General in a multi-count felony Complaint in connection with his medical practice in Los Angeles. Count 6 of the Complaint charged a felony-level violation of CAL. BUS. & PROF. CODE § 650 (2001), which forbids soliciting and receiving illegal consideration for medical referrals. The criminal acts charged in that Count were alleged to have occurred between January and June 2002. Petitioner appeared with counsel in the Superior Court of California, County of Los Angeles, on March 16, 2004, and pleaded *nolo contendere* to Count 6 of the Complaint, which by prosecution motion had been amended to a misdemeanor-level violation of CAL. BUS. & PROF. CODE § 650. The court proceeded to sentencing immediately: Petitioner was sentenced to a one year term of probation, was ordered to make restitution of $15,400.00 and was required to pay other minor costs and fees. The remaining charges outstanding against Petitioner were dismissed. Petitioner sought and was granted early termination of his probation as soon as the ordered payments were made, on or about April 16, 2004.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(1) of the Act mandates the exclusion, for a period of not less than five years, of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under any State health care program." On April 29, 2005, the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years.

Based on his early termination from probation, Petitioner on July 225, 2005 sought relief under CAL. PENAL CODE §1203.4 (2005), California's statutory plan that allows some defendants to gain

expunction of their conviction records and relief from some of the penalties and disabilities otherwise imposed by California law. On September 16, 2005, the Superior Court set aside Petitioner's plea of *nolo contendere* and its finding of guilt based on that plea, entered a plea of not guilty in their place, and dismissed the charge.

Acting through counsel, Petitioner timely sought review of the I.G.'s action by letter dated June 27, 2005. I convened a prehearing conference by telephone on August 31, 2005, pursuant to 42 C.F.R.§ 1005.6. The I.G. expressed the intention to seek summary disposition on written submissions, and I established a schedule for the filing of documents and briefs. All briefing is now complete based on my Order of September 7, 2005 and my letter of December 21, 2005.

The evidentiary record on which I decide the issues before me contains twelve exhibits. The I.G. timely proffered seven exhibits marked I.G. Exhibits 1-7 (I.G. Exs. 1-7), and has sought leave to substitute a signed copy of I.G. Ex. 4 in place of the unsigned copy originally proffered. Petitioner timely proffered five exhibits. Petitioner's Exhibits 1-5 (P. Exs. 1-5). Neither party has objected to any of those exhibits, and therefore they are all admitted as designated: I.G. Ex. 4 is admitted in signed form. Petitioner submitted a sixth proposed exhibit (P. Ex. 6) with his Response Brief on January 18, 2006: it is a letter sent from Petitioner's counsel to counsel for the I.G. on December 9, 2005. Its proffer as part of Petitioner's concluding brief is untimely, and its content is not evidence but argument. It is not admitted to the evidentiary record on which I decide the issues, but remains part of the case file for purposes of reference.

II. Issues

The legal issues before me are limited to those enumerated at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and

2. Whether the proposed five year period of exclusion is unreasonable.

The controlling authorities require that both issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion. for his predicate conviction has been established. A five year period of exclusion is reasonable as a matter of law since it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. 1320a-7(c)(3)(B).

III. Controlling Statutes and Regulations

Section 28(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1) requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII or under any State health care program." The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. §1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "convicted" as including those circumstances:

> (1) when a judgment of conviction has been entered against the individual ... by a State ... court regardless of whether ... the judgment of conviction or other record relating to criminal conduct6 has been expunged;
>
> (2) when there has been a finding of guilt against the individual ... by a State ... court;

> (3) when a plea of guilty or *nolo cotendere* by the individual ... has been accepted by a ... State ... court; or
>
> (4) when the individual ... has entered into participation in a ... deferred adjudication ... program where judgment of conviction has been withheld.

Act. section 1128(i)(1)-(4), 42 U.S.C. § 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision. The I.G. has not sought to enhance the five-year mandatory minimum period by offering to prove any of the carefully-defined aggravating factors set out at the 42 C.F.R. § 1001.102(b). For that reason, I may not inquire into the existence, importance or effect of any of the specific aggravating or mitigating factors set out at 42 C.F.R. § 1001.102(b) and (c).

In this case Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

IV. Findings and Conclusions

I find and conclude as follows:

1. On his plea of *nolo contendere* on March 16, 2004, in the Superior Court of California, County of Los Angeles, Petitioner Amable de los Reyes Aguiluz, Jr., M.D., was found guilty of the misdemeanor offense of soliciting and receiving illegal considerations for medical referrals, in violation of CAL. BUS. & PROF. CODE § 650. I.G. Exs. 5, 6.

2. Judgment of conviction was entered against Petitioner, and sentence was imposed upon him, in the Superior court on March 16, 2004. I.G. Ex. 6.

3. The plea, finding of guilt, and judgment of conviction described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. For purposes of the exclusion remedy established by section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), a "conviction" established pursuant to any of the definitions set out at sections 1128(i)(1), (2), and (3) of the Act is unaffected by its subsequent expunction pursuant to the terms of CAL. PENAL CODE § 1203.4.

5. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty, of which Petitioner was found guilty, and of which was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under a State health care program. I.G. Exs. 4, 5, and 6; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

6. By reason of Petitioner's conviction, a mandatory basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

7. By reason of his conviction, Petitioner was subject to, and the I.G. was required to impose, the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all other federal health care programs. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a).

8. On April 29, 2005 the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, based on the authority set out in section 1128(a)(1) of the Act.

9. On June 27, 2005 Petitioner perfected his appeal from the I.G.'s action by filing a timely hearing request.

10. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

11. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Thelma Walley*, DAB No. 1367 (1992).

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Andrew L. Branch*, DAB CR1359 (2005); *Lyle Kai, R.Ph.*, DAB CR1262 (2004) *rev'd on other grounds*, DAB No. 1979 (2005). Those two essential elements are fully established in the record before me.

Petitioner does not deny here any of the material procedural events in the criminal proceedings against him. The underlying facts of those material procedural events are clear and uncontested: I.G. Exs. 5 and 6 show that on March 16, 2004, Petitioner appeared in the Superior Court of California, county of Los Angeles, with counsel.

The appearance was the result of plea negotiations in connection with a six-count complaint filed against Petitioner a year earlier. I.G. Ex. 3. Count 6 of that Complaint charged Petitioner with a felony violation of CAL. BUS. & PROF. CODE § 650, an anti-kickback statute that forbids soliciting and receiving illegal considerations for medical referrals. By prosecution motion, the charge in Count 6 was amended to misdemeanor level. I.G. Ex. 6, at 1. Petitioner tendered a plea of *nolo contendere* to Count 6; the trial court found that a factual basis existed for the plea, approved the plea, accepted the plea, and found Petitioner guilty. I.G. Ex. 6, at 2. Final judgment of conviction was entered against Petitioner and sentence was imposed upon him at the same hearing in the Superior Court. I.G. Ex. 6, at 2-3. Those events satisfy the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

Petitioner contests the second element, the relation of the offense for which he was convicted to the delivery of an item or service under the California state health care program called Medi-Cal, Petitioner's Brief (P. Br.), at 9. It is true that the California statute does not specifically refer to the Medi-Cal program, or require that its abuse be proven as an essential element in a violation of CAL. BUS. & PROF. CODE § 650. But the title of the statute or the labeling of the offense which it condemns is irrelevant. *Lyle Kai, R. Ph.*, DAB No. 1979; *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Berton Siegel, D.O.*, DAB No. 1467; *Thelma Walley*, DAB No. 1367; *Dewayne Franzen*, DAB No. 1165 (1990). What matters is whether there is evidence in the record of a connection between the details of Petitioner's violation of CAL. BUS. & PROF. CODE § 650 and the Medi-Cal program. *Michael Blake Runyon, D.P.M.*, DAB No. 1555 (1996).

In this case there is such evidence in a statement given by an agent of California's Bureau of Medi-Cal Fraud and Elder Abuse. I.G. Ex. 4. The statement is part of the official court record of Petitioner's

conviction, and thus is part of the material on which I may rely in assessing the factual setting of that conviction. The statement explains the conduct for which Petitioner was convicted and its connection to the Medi-Cal program: stated in its essentials, the conduct involved Petitioner's demanding and accepting kickbacks in return for sending Medi-Cal patients' laboratory specimens to Lab-Serv, a medical testing laboratory, over a six-month period from January through June, 2002. Petitioner established a four-tiered schedule of the kickbacks he demanded, with two of those tiers specifically devoted to Medi-Cal referrals. I.G. Ex. 4, at 7. He reviewed a list of actual referrals and applied a revised three-tiered kickback schedule with two Medi-Cal tiers, and at the same time prepared a customized and more expensive list of laboratory tests to be performed on his Medi-Cal referrals. I.G. Ex. 4, at 11. He received the kickbacks, but expressed some dissatisfaction that their amounts had not been in exact compliance with the schedule he had demanded. I.G. Ex. 4, at 12-13. This evidence is sufficient to establish the requisite nexus and common-sense connection between the conviction and the Medi-Cal program. *Andrew Anello*, DAB No. 1803 (2001); *Neil R. Hirsch, M.D.*, DAB No. 1550 (1995); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Berton Siegel, D.O.*, DAB No. 1467. The I.G. has proven the second essential element.

Petitioner's principal reliance here is on the effect of CAL. PENAL CODE § 1203.4, by which his conviction was expunged on September 16, 2005. P. Ex. 4. He urges that the effect of that expunction, and the policy behind California's statutory plan, bar the application of the definition of "conviction" set out in section 1128(i)(1) of the Act. P. Br., at 5, 14-15; Petitioner's Response Brief (P. Res. Br.), at 1-6. Now, this forum has never denied that such dispositions might well represent rational criminal justice policy, but the operation of such a policy in California's criminal courts does not protect Petitioner here. For purposes of this remedial exclusion sanction, created and authorized by federal statute and intended to protect federally-funded health programs, federal law defines

"conviction". *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994); *Theresa A. Bass*, DAB CR1397 (2006); *Gerald David Austin*, DAB CR1207 (2004).

Three of the federal statutory definitions squarely apply. Petitioner's guilty plea was accepted (I.G. Ex. 6, at 2) in satisfaction of the definition at section 1128(i)(3) of the Act. The court found Petitioner guilty upon his plea (I.G. Ex. 6, at 2) in satisfaction of the definition at section 1128(i)(2) of the Act. A judgment of conviction was entered against Petitioner and later expunged (I.G. Exs. 5, 6; P. Ex. 4) in satisfaction of the definition at section 1128(i)(1) of the Act. The Department Appeals Board (Board) has very recently revisited the broad question of state definitions of "conviction" in the context of section 1128(i) of the Act, and has reaffirmed in comprehensive language the fundamental principle that the Act's definitions apply in these circumstances. *Marc Schneider, D.M.D.*, DAB No. 2007 (2005). The Board's analysis represents the latest word in this debate, and it supports the I.G.'s position: Petitioner has been convicted as that term is defined by federal law and is subject to exclusion.[1]

The point is not clearly developed, but Petitioner also appears to find significance in the fact that he pleaded *nolo contendere* to a misdemeanor-level violation of CAL. BUS. & PROF. CODE § 650, and not to the felony-level violation that had originally been charged. P.

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[1] Although in somewhat different contexts, the Ninth Circuit has repeatedly held that California convictions expunged pursuant to CAL. PENAL CODE § 1203.4 remain cognizable as bases for actions under federal statutes and regulations. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *Carr v. INS*, 86 F.3d 949 (9th Cir. 1996). In *United States v. Hayden*,255 f.3D 768 (9TH Cir. 2001) California courts and administrative bodies have likewise treated such convictions as cognizable for special purposes comparable to the one at issue here.

Br., at 2-4, 10-12. The level of the violation charged in Count 6 was negotiated and amended on the prosecution's motion. I.G. Ex. 6, at 1. The motion, and the court's amendment of the offense to misdemeanor level, were accomplished under CAL PENAL CODE § 17(b)(4), which simply allows the prosecution to stipulate that an offense will be treated as a misdemeanor. The provision does not alter the facts as charged. The factual recitations in Count 6 and I.G. Ex. 4 remain applicable; no variance or failure of proof as to any of them is apparent. Since section1128(a)(1) of the Act makes no distinction whatsoever between felony convictions and misdemeanor convictions, there is no significance of benefit to Petitioner in the matter. *Lorna Fay Gardner*, DAB 1733 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721.

Petitioner's discussion of the nature of his conviction includes the concession that CAL. BUS. & PROF. CODE § 650 can be characterized as an anti-kickback statute. The Board has so characterized it. *Michael Blake Runyon, D.P.M.*, DAB No. 1555. having made that strategic concession, however, Petitioner goes on to argue that his liability for exclusion should have been assessed under the permissive-exclusion provisions of section 1128(b)(7) of the Act. P. Res. Br., at 7-8. That argument is erroneous and it is refuted by an extensive body of authority in this forum. Once a conviction is shown to be within the ambit of section 1128(a)(1), the mandatory operation of that section bars any petitioner, including this one, from claiming that other more lenient, more discretionary, or more favorable exclusionary provisions should be applied instead. Even in situations where the underlying conviction could plausibly be argued to fall within both section 1128(a)(1) and one or more of the permissive exclusions or three-year exclusion periods of section 1128(b)(1)-(15), the rule is clear: if section 1128(a)(1) fits, then the mandatory exclusion and mandatory minimum period prescribed by section1128(a)(1) must be imposed. Neither the I.G. nor an Administrative Law Judge may choose to proceed otherwise. *Kenneth M. Behr*, DAB No. 1997 (2005); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002); *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000); *Lorna Fay Gardner*, DAB No. 1733; *Douglas Schram,*

R. Ph., DAB No. 1372 (1992); *Niranjana B. Parikh, M.D., et al.*, DAB No. 1334 (1992); *David S. Muransky, D.C.*, DAB No. 1227 (1991); *Leon Brown, M.D.*, DAB No. 1208 (1990); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990); *Charles W. Wheeler, et al.*, DAB No. 1123 (1990); *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990).

Petitioner represents that "[n]o Medicare, Medicaid or other federal or state health care funds are involved in these alleged violations of BPC § 650." P. Br., at 4. He does not develop this point beyond the implicit suggestion that the alleged non-inclusion of program funds in the actual kickback payments would keep his conviction outside the reach of section 1128(a)(1). P. Br., at 13. If the argument were made explicit and were factually correct it still would not prevail. The essential elements in an exclusion based on a conviction "related to the delivery of an item or service under ... any state health care program" are set out above, and they do not include a showing of loss to a protected program, or the direct involvement of program funds in the criminal activity. *Boris Lipovsky, M.D.*, DAB No. 1363, *Brij Mittal, M.D.*, DAB CR1012 (2003); *Efstathios Mark Varidin, D.O.*, DAB CR971 (2002); *José Grau, M.D.*, DAB CR930 (2002).
His briefing and one of Petitioner's exhibits portray him as a respected member of his community who has an otherwise-unblemished history. P. Br., at 2, 15-18; P. Ex. 1. He asserts that the sanction of exclusion is disproportionate to the underlying seriousness of his crime and is therefore unconstitutional. P. Br., at 12. He also urges, while not quite conceding that the conviction should be counted at all, that the date of its expunction should also toll the end of the exclusion, approximately four months after it began. P. Br., at 14-15; P. Resp. Br., at 1-7. For all three reason he believes that the period of his exclusion should be reduced. I have no reason to doubt that Petitioner enjoys a good reputation, but neither have I the authority to weigh the proportionality of Petitioner's crime against the effects of his exclusion on the scale of constitutionality. *Kenneth M. Behr*, DAB No. 1997. Moreover,

unless the I.G. proposes to enhance the period of exclusion beyond the mandatory minimum period, I simply may not consider mitigating factors of any sort in assessing the reasonableness of the five-year period. 42 C.F.R. § 1001.102(c). *Salmon Daniels*, DAB CR1380 (2005); *Emma Voloshin, M.D.*, DAB CR1179 (2004); *Diane C. Turner, M.D.*, DAB CR1176 (2004); *Carl Jeffrey Boyette, L.B.N.*, DAB CR540 (1998); *Robert L. Howard*, DAB CR459 (1997); *Charles Addo Yobo, M.D.*, DAB CR361 (1995); *Doina M. Buzea, M.D.*, DAB CR310 (1994). The I.G. has not proposed an enhanced period of exclusion here.

The five-year period of exclusion proposed in this case is the irreducible minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable. 42 C.F.R. § 1001.2007(a)(2). Neither the Department Appeals Board nor I may reduce it. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850. And since the expunction of Petitioner's conviction is of no consequence in this matter, its effective date has no effect on the exclusion or its length.

Petitioner warns that I should commit procedural error of constitutional dimension if I resolve the merits of this case on the I.G.'s Motion for Summary Affirmance. P. Br., at 6-7. I have no authority to consider the question of constitutionality, but to respond to Petitioner's point I need not do so: it is well-established in this forum that summary disposition is appropriate in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Tanya A. Chuoke, R.N.*, DAB No. 1721; *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367; *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary disposition, there is neither a right to – nor

the need of – a full evidentiary hearing. *Surabhan Ratanasen* M.D., DAB No. 1138 (1990); *John W.. Foderick* M.D., DAB No.1125. The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Amable de los Reyes Aguiluz, Jr., M.D., from a participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby sustained.

/s/ Richard J. Smith
Richard J. Smith
Administrative Law Judge

SUPPLEMENTAL APPENDIX C

LOGO
of Department of
Health And Human Services

Office of the Secretary
Departmental Appeals Board
Appellate Division, MS 6127
Room G-644, Cohen Building
330 Independence Avenue, SW
Washington, D.C., 20201

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Heroico M. Aguiluz, Esq.
Aguiluz Law Corporation
1240 Crenshaw Boulevard
Los Angeles, California 90019-3126

And

INTER-OFFICE MAIL – RETURN RECEPT REQUESTED

Kelly Bagby, Senior Counsel
Office of Counsel to the Inspector General
Room 5527, Cohen Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Amable de los Reyes Aguiluz v. Inspector General
DAB CR1417
(Civil Remedies Docket No. C-05-421)
Appellate Division Docket No. A-06-63

ORDER DECLINING TO ACCEPT UNTIMELY APPEAL

The Petitioner, Amable de los Reyes Aguiluz, through his counsel Heroico M. Aguiluz, requests that the Board accept his untimely appeal of the decision of an Administrative Law Judge (ALJ) affirming the determination of the Inspector General (IG) to exclude Petitioner from federal health care programs for a period of five years under section 1128(a) (1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7 (a) (1)). We conclude that the regulations governing appeals of exclusions imposed by the IG do not provide the Board with discretion to accept the untimely appeal. We thus deny Petitioner's request.

Applicable Law

Section 1128 (a) (1) of the Act mandates the exclusion for not less than five years of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." Section 1128 (a) (1) is implemented by regulations at 42 C.F.R. Part 1001. Part 1001 provides that the appeal procedures in part 1005 of 42 C.F.R. apply to appeals of exclusions. 42 C.F.R. § 1001.2007 (e). Part 1005 of 42 C.F.R. governs appeals before ALJs of the IG's determinations to exclude providers from federal health care programs and appeals of ALJ decisions to the Board. The time limit for filing appeals of ALJ decisions to the Board is at 42 C.F.R. § 1005.21 (a), which states:

> Any party may appeal the initial decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30 day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30 day period and shows good cause.

Additionally, the regulations provide that if an extension of time within which to appeal an ALJ decision imposing an exclusion is granted under section 1005.21 (a) , the ALJ decision will become final and binding on the day following the end of the extension period.[1] 42 C.F.R. § 1005.20 (e).

Facts

The LAJ decision was dated February 24, 2006. In a motion filed March 31, 2006, Petitioner requested a 30-day extension of time to submit his brief appealing the ALJ decision, which Petitioner stated he received on March 1, 2006. Petitioner stated that the extension was needed because his counsel had been hospitalized from March 14 to March 21 for profuse internal bleeding from which he was recuperating. The Presiding Board Member determined that there was good cause for the request and granted an extension in a letter dated April 4, 2006. That letter stated that under the extension, the deadline for filing an appeal of the ALJ decision was May 1, 2006 (as the 30th day, April 30, fell on a Sunday).

On May 2, 2006, Petitioner's counsel telephoned the Board staff attorney, stated that the appall had been due on May 1, and requested permission to file the appeal late. The Board staff attorney replied that the IG's regulations severely limit the Board's authority to grant extensions of time to file appeal, and advised that Petitioner submit a request by fax as soon as possible. The Petitioner submitted his brief and request to allow late filing by fax, with a cover sheet dated May 2, 2006. Information imprinted on each sheet by a fax machine indicates that the pages were transmitted beginning at 3:20 a.m. on May 3, 2006. The request to allow late filing states that Petitioner was unable to submit the brief on May 1 due to poor health of his counsel and computer problems.

Analysis

[1] There is an exception to this rule for civil money penalty cases under section 1128 of the Social Security Act, but this is not such a case.

The regulations governing this appeal provide that a party may appeal an ALJ decision by filing a notice of appeal with the Board within 30 days of the date of service of the initial decision, and that the Board may extend the initial 30 day period "for a period not to exceed 30 days ..." 42 C.F.R. § 1005.21(a). The regulations do not provide the Board with any discretion or authority to grant further extensions or to otherwise modify or waive the requirement that an appeal be filed by the specified deadline. We thus conclude that we have no authority to grant Petitioner's request for an extension of time to submit his appeal beyond the previously granted 30-day extension, which is the only extension permitted by the regulations. Moreover, the regulations state, with one exception not applicable here, that when a 30-day extension for filing an appeal is granted, the ALJ's decision becomes final and binding on the day after the end of that 30-deay extension. 42 C.F.R. § 1005.20(e). Under that regulation, the ALJ decision became final and binding on May 2, 2003, the day after the extension expired and the day before Petitioner transmitted his late appeal to the Board by fax. Once the ALJ decision became final, petitioner's appeal rights were extinguished as a matter of law.

Additionally, we conclude that we may not accept Petitioner's untimely appeal. Since no notice of appeal has been filed within the regulatory deadline, the Board is closing this case on its docket.

/s/ Judith A. Ballard
Judith A. Ballard

/s/ Donald F. Garrett
Donald F. Garrett

/s/Sheila Ann Hegy
Sheila Ann Hegy
Presiding Board Member

cc: Gregory Demske
Chief, Administrative Litigation Branch
Office of Counsel to the Inspector General